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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

PACIFIC GAS AND ELECTRIC COMPANY and
WISCONSIN POWER & LIGHT COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Part I of the Federal Power Act provides for the development, operation and use of the hydroelectric potential in the nation's water resources under a system of licenses. Hydroelectric project licenses extend for a defined initial term, usually fifty years. The licenses for many of these projects have expired or will expire in the next several years. Such projects are subject to relicensing, and a number of relicensing proceedings are under way.

At the conclusion of a license term the Federal Energy Regulatory Commission may either recommend to Congress that the United States take the project over under section 14(a) of the Act, or provide for relicensing under section 15(a) of the Act. Under section 15(a), the Commission is either to issue a new license to the "original licensee" or issue a license to some "new licensee." Section 7(a) of the Act provides that State and municipally-owned utilities shall have a preference when the Commission is "issuing licenses to new licensees under section 15." The question presented in this case is:

> Has the United States Court of Appeals for the Eleventh Circuit erred in affirming the Federal Energy Regulatory Commission's decision that the preference provided in section 7(a) of the Act for a State or a municipality applies in a relicensing proceeding under section 15 of the Act against the project's original licensee?

PARTIES TO THE PROCEEDING BELOW

Petitioners Pacific Gas and Electric Company and Wisconsin Power & Light Company are each investor-owned utilities. In addition to Petitioners and Respondent, the parties before the court of appeals were thirty-six additional regulated public utility companies, all of whom are also petitioning this Court for a writ of certiorari to review the decision below; and the cities of Bountiful, Utah and Santa Clara, California, the Clark-Cowlitz Joint Operating Agency and the American Public Power Association, all of whom intervened before the court below. These parties are listed in the Petitioners' Appendix at pages 87a and 88a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Pacific Gas and Electric Company ("PGandE") and Wisconsin Power and Light Company ("WP&L"), petitioners in the proceeding below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 685 F.2d 1311 (11th Cir. 1982) and is set forth in the Petitioners' Appendix ("Pet. App.") at 1a *et seq.* Opinion and Order No. 88 ("Opinion 88") of the Federal Energy Regulatory Commission ("FERC" or "Commission") and its Order Denying Rehearing ("Rehearing Order") are reported at 11 FERC (CCH) ¶ 61,337 and 12 FERC (CCH) ¶ 61,179 and are set forth at Pet. App. 14a *et seq.* and 82a *et seq.*

JURISDICTION

The judgment of the court of appeals (Pet. App. 84a) was entered on September 17, 1982. Rehearing and suggestion for *en banc* consideration were denied on November 12, 1982 (Pet. App. 85a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The case involves Part I of the Federal Power Act (the "Act"), formerly known as the Federal Water Power Act of 1920, 16 U.S.C. 792 *et seq.* Sections 7, 14, 15 and 22 of the Act are set forth at Pet. App. 88a *et seq.*

STATEMENT OF THE CASE

A. The Issue

The case involves the relicensing of the nation's federally licensed hydroelectric projects. It presents the question, of first impression, whether the Act provides State and municipal applicants[1] with a "preference right" to obtain privately developed, owned and operated projects from their original licensees when the latter seek to relicense those projects. Privately-owned licensees presently have under license over 500 hydroelectric generating plants, which have a total replacement value of approximately $22 billion.[2]

Initial licenses are usually granted for fifty years. When an original license expires, disposition of the project is governed by sections 14 and 15 of the Act, 16 U.S.C. 807, 808. Section 14 permits the United States and, within limits, other governmental entities to take

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[1] The term "municipal" is used herein to refer to both State and municipal entities.

[2] FERC, FERC-0070, *Hydroelectric Power Resources of the United States* p. xxxiii (January 1980). The replacement value is based upon an estimated replacement cost of $950 per kilowatt of capacity, see Energy Information Administration, U.S. Department of Energy, *Projected Costs of Electricity from Nuclear and Coal Fired Power Plants* DOE/EIA-0356/1 Vol. 1 at 26 (1982).

over projects held by private licensees.[3] Section 15 provides for the relicensing of all projects not taken over under section 14.

Section 7(a), 16 U.S.C. 800(a), confers upon municipal applicants a preference over private applicants in three license and permit situations where the plans of the municipal and the private applicants are "equally well adapted . . . to conserve and utilize in the public interest the water resources of the region." The first two situations are (i) upon application for a preliminary permit, authorizing pre-development activities prior to the time of initial license, and (ii) upon application for initial license, but no such municipal preference is available where a preliminary permit has been issued.

The third situation, the subject of the present dispute, occurs upon relicensing. In this regard, section 7(a) directs the Commission to apply a municipal preference "in issuing licenses to new licensees under section 15 [16 U.S.C. 808] hereof." 41 Stat. 1067 (1920). Section 15(a), in turn, distinguishes a "new licensee," who is a stranger to the project, from the project's "original licensee," by providing that upon relicensing the Commission has the choice:

> to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee.

The petitioning utilities have contended that because section 7(a) creates the preference with respect to "new licensees under section 15," and section 15 uses "new licensees" and "original licensees" as distinct and

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[3] Section 14 authorizes the United States, upon specified terms, to take over any project upon expiration of the license and also reserves the right of the United States or (where authorized under State law) the right of any State or municipality to take over a project at any time "upon payment of just compensation."

opposite categories, the preference applies only against applicants *other than* the original licensee. Conversely, the Commission and the municipal systems have argued that section 15(a)'s distinction between "new" and "original" licensees should be disregarded and that section 7(a)'s term "new licensees under section 15" encompasses "original licensees" as well.

B. The Commission's Decision

In 1978, the City of Santa Clara, competing for PGandE's Mokelumne River Project (FERC No. 137) petitioned the Commission for a declaratory order that the Act provides a municipal preference upon relicensing against original licensees. The City of Bountiful, Utah had previously filed a similar petition in its case with Utah Power and Light Company. The Commission consolidated those petitions into a single new proceeding to determine the relicensing preference issue on a general basis, and invited interested parties to intervene (Pet. App. 21a-22a). It held the question to be a "purely legal" matter of statutory construction and so did not refer the case to an Administrative Law Judge, gather evidence or hold a hearing, but decided the issue solely on briefs and oral argument. (Pet. App. 23a-24a). On June 27, 1980, the Commission issued Opinion 88, agreeing with the municipal systems' claim that the Act provides them with a preference on relicensing that would apply even against the project's original licensee.

Opinion 88 recognized that section 7(a) creates a preference only against "new licensees under section 15" and that section 15(a) distinguishes between "new" and "original" licensees. However, it found that "new licensees under section 15" does not have the same meaning in section 7(a) as "new licensees" carries in section 15 "because the contexts of usage are different." (Pet. App. 59a).[4] After a further discussion of the statutory

[4] The Opinion construed the preference provision as containing "a silent prepositional phrase." Pet. App. 68a.

language that is difficult to paraphrase, (Pet. App. 59a-64a), the Commission concluded that "new licensees under section 15" has "sufficient ambiguity" that its meaning should be ascertained from legislative history.[5]

The Senate Commerce Committee added to section 7 the first reference to either section 15 or relicensing when it adopted the present relicensing preference provision in 1919, late in the legislation's long progress toward enactment. Report of Senate Committee on Commerce on H.R. 3184, S. Rep. No. 180, 66th Cong., 1st Sess. at 13 (1919) ("1919 Senate Commerce Committee Report"). Opinion 88 began its historical analysis with an earlier version, an "Administration bill" introduced in early 1918. It found that the bill "silently" provided a relicensing preference against "original licensees" and that this "silent" preference remained in each subsequent version of the legislation that preceded the Senate Commerce Committee's amendment.[6]

As the Commission in the Opinion examined each new version of the legislation by which Congress refined the terms applying the preference just to preliminary permits and initial licenses, it found that those amendments demonstrated, in words it repeatedly underlined, "*no expressed intent to eliminate*" the preference "silently" applicable on relicensing.[7] When the Commission considered the version of the bill immediately prior to the Senate amendment, it observed that its language "made it *appear*" that the preference did not apply to relicensing. (Pet. App. 39a, emphasis in the original). The Commission then concluded that even though the relicensing preference amendment referred only to "new licensees," it applied against "original licensees" because by adopting

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[5] Pet. App. 64a. The Opinion also claimed that construing "new licensees" not to include "original licensees" would yield what it characterized as "absurd results." Pet. App. 67a-71a, discussed at pages 22-25, *infra*.

[6] See, *e.g.*, Pet. App. 66a [in two places] and also at 39a.

[7] Pet. App. 37a, 38a, 40a.

the amendment Congress had demonstrated "*no express intent to eliminate*" the "silent" preference against original licensees.[8]

Opinion 88 also referred to the Commission's prior, inconsistent construction of the relicensing preference offered to Congress when it was amending the Act's relicensing provisions in 1967-68. As early licenses granted under the Act approached expiration in the 1960's, the Chairman of the Senate Commerce Committee asked the Federal Power Commission to determine whether any amendments to the Act's relicensing provisions were in order. 113 Cong. Rec. 26,185 (1967). In response, the Commission, *inter alia*, informed Congress that the relicensing preference established by section 7(a) did not apply against an "original licensee." While the Commission suggested that other provisions be amended, it recommended that Congress leave the preference provision unchanged so that relicensing decisions would be based wholly on the merits of the respective applications without giving a preference right to either the municipal applicant or the original licensee.[9] With the Commission's position and recommendations before it, Congress amended certain of the Act's relicensing provisions, but left section 7(a) intact.[10] Opinion 88 dismissed argu-

[8] Pet. App. 43a, emphasis in the original.

[9] *See* letters from the Commission's Chairman to the Vice President and the Speaker of the House and the Chairman's testimony before the pertinent Committees. Hearings on S. 2445 before the Senate Commerce Committee, 90th Cong., 2d Sess. at 6, 13-14, 19 (1968); Report of the House Interstate and Foreign Commerce Committee, H. Rep. No. 1643, 90th Cong., 2d Sess. at 8 (1968); Hearings on H.R. 12698 before the House Comm. on Interstate and Foreign Commerce at 19, 23 (1968).

[10] The Senate Commerce Committee specifically endorsed the Commission's construction of § 7(a), Report of the Senate Commerce Committee, S. Rep. No. 1338, 90th Cong., 2d Sess. at 3-4 (1968); and the House Committee on Interstate and Foreign Commerce endorsed the proposition that the Commission should decide relicensing determinations on the merits under the "best

ments based upon this earlier construction by the Commission as a "red herring." (Pet. App. 74a).

Two months after issuing Opinion 88, on August 27, 1980, the Commission issued a two page Rehearing Order denying requests for rehearing (Opinion 88-A, Pet. App. 82a). With only two Commissioners voting to deny rehearing,[11] the Commission then described the legislative history as "occasionally opaque" and found neither the language of the statute nor the legislative history "clearly dispositive of the question," but would not rehear Opinion 88.

C. The Decision of the Court of Appeals

Thirty-eight affected utilities, including PGandE and WP&L, appealed the Commission's decision to the courts of appeal under section 313(b) of the Act, 16 U.S.C. § 8251(b). Last September, the United States Court of Appeals for the Eleventh Circuit affirmed the Commission in a short opinion that dismissed, largely without explanation, the arguments presented by the utilities. The court of appeals did not specifically construe the terms of the statute. Instead, it held that (Pet. App. 9a):

> Like the Commission, we easily overcome the plain meaning hurdle. The fact that the public companies [the municipals] here have accorded one reasonable interpretation to the words 'new licensees' . . . and that private interests have accorded a different but reasonable meaning to the phrase . . . suggests that the meaning of the term 'new licensees' is sufficiently ambiguous to merit resort to legislative history.

The court agreed with the Commission that "the plain meaning advanced by petitioners [the utilities] leads to absurd results." The court held that the Commission had "properly relied heavily upon legislative history," re-

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adapted" standard of § 10(a), H. Rep. No. 1643, 90th Cong., 2d Sess. at 5 (1968).

[11] The Chairman, the third Commissioner participating in consideration of the rehearing requests, voted only "Present."

ferred to four identified items of historical material, and said of those items:

> Although much of this material is weak, for the purpose of determining legislative intent, it is helpful and apparently all that is available.

(Pet. App. 10a-13a). The court explained that it was affirming the Commission because "We must give great deference to the Commission's statutory interpretation." It dismissed the inconsistency between the Commission's present interpretation and the construction advanced to Congress in 1967-68 as "insubstantial and speculative." (Pet. App. 13a).

REASONS FOR GRANTING THE WRIT

A. The Case Presents a Major Federal Question Concerning Interpretation of Part I of the Federal Power Act and the Allocation, or Re-Allocation, of the Nation's Hydroelectric Resources

This case raises an important question concerning the interpretation of Part I of the Federal Power Act. Its outcome will have a major impact on how the Commission exercises its stewardship over the nation's hydroelectric resources and how it allocates, or re-allocates, the benefits of those resources among the nation's electric power consumers.

The decision of the Commission and the court of appeals places in substantial jeopardy the continuing use of hydroelectric resources by public utility companies and their customers throughout the United States. Disposition of the nation's water power resources is not only a matter of great significance in the interpretation of the Federal Power Act; it carries important economic and social implications as well.

Hydropower is a significant source of electric generation in the United States, and hydroelectric generation from projects built long ago has become the cheapest major form of producing electricity for the utility customers those projects were built to serve. Consequently,

a decision that favors a shift of ownership of the nation's privately developed water power projects away from their original licensees poses a major threat to both the many utilities owning and operating such projects and, through unavoidable rate impacts, all of their customers.

Hydroelectric projects produce electric power without burning fuel. Licensed hydroelectric facilities now owned by public utility companies have an estimated value to their customers, in terms of fuel savings alone, of between 1.2 and 3.4 *billion* dollars per year (depending on whether coal or oil is used as a replacement fuel).[12] Loss of these projects could impose upon affected utilities and their customers not only the loss of these fuel savings, but the additional costs of replacing the hydroelectric capacity with new fuel-burning facilities. In addition, hydro projects have been closely integrated into their existing owners' generating and transmission systems, systems built to realize maximum efficiency from combinations of hydroelectric and thermal electric power plants.

The effects of the Commission's decision on PGandE could be especially severe since it has more hydroelectric capacity, serving more people, than any other investor-owned utility in the United States. PGandE has 29 hydropower projects licensed under the Act (covering 62 operating plants). They account for some 20% of its total generating capacity[13] and serve an area whose population exceeds nine million people. If PGandE lost those projects, the cost of replacing the energy they now

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[12] See Department of Energy, *Monthly Energy Review*, pp. 62-68, 90, cover (December 19, 1982); Edison Electric Institute, *Statistical Yearbook* Table 12 (1981) (advance release).

[13] PGandE FERC Form 1, pp. 402-15 (1981). PGandE's Mokelumne River Project (FERC 137), one of the two specific cases from which the Commission's consolidated proceeding arose, alone represents approximately 208,500 kw of hydroelectric capacity. In addition, municipal applicants have already sought to obtain three of PGandE's other projects on relicensing. FERC Project Nos. 1962, 1061 and 1988.

generate can be roughly estimated at more than $800 million annually.[14]

The Commission's interpretation, announced in this case, reverses its own construction offered to Congress in 1968. The Commission's present construction, accepted by the court of appeals, would give municipal systems a preference right that would enable them to take control at relicensing of the nation's privately operated hydroelectric projects, without demonstrating that the public interest would thereby be better served.[15]

The Commission's "purely legal" analysis of this issue of critical importance to the administration of the Federal Power Act should undergo meaningful review before the interpretation becomes final. However, as we shall show, the court of appeals failed to give the FERC's

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[14] This estimate is based on PGandE's marginal cost of generation of 7.8 mills/kwh. See PGandE General Rate Case Application, California Public Utilities Commission, Application No. A-82-12-48.

[15] The purpose of the preference is theoretically only to break ties where the Commission finds that two competing applications are "equally well adapted" to fulfill the purposes of the Act. Section 7(a). Pet. App. 88a. However, the result of awarding the project to a municipal system wherever there is a "tie" can be devastating to the chances of the project's owner. It is all too easy to find a "tie" in any complex fact situation in order to avoid the potentially time-consuming and difficult analysis necessary to determine if one applicant is better than another. The risk of such results is enhanced by the municipal systems' claims that § 7(a)'s provisions allowing them to "make" their plans "equally well adapted" permits them simply to copy any plan or proposal made by the original licensee. Indeed, the Commission has plainly not reserved "tie-breakers" only for the rare occasional case in which there is no basis for differentiating between the plans and capabilities of two applicants. Instead, it has used a "first-in-time" "tie-breaker" with respect to preliminary permits as a *substitute* for the hard choices involved in weighing the merits of competing applications. Thus, the Commission decided all of 120 canvassed cases on the basis of filing date, without ever finding that one applicant's plans were "better" than another's. *City of Dothan, Alabama v. FERC*, 684 F.2d 159, 166 (D.C. Cir. 1982), Mikva, J. dissenting.

decision that meaningful review. It failed to examine the words of the Act for itself and used the rationalization of "great deference" to justify its refusal to engage in independent analysis. Consequently, unless this Court issues the requested writ of certiorari, the Commission's new and radical construction of the Federal Power Act will have evaded the serious judicial scrutiny which the circumstances demand and our system requires.

B. The FERC and the Court of Appeals Erroneously Construed the Relicensing Preference

1. *The Language of the Statute Is Clear on its Face*

For all of its importance, this should have been a simple case. The preference is contained in one statutory provision, section 7(a), which is linked by explicit reference to another provision, section 15(a). When the two sections are read together, as the statute directs, the plain meaning of the preference language emerges directly from the text.

Section 7(a) provides, in pertinent part:

> In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the Commission shall give preference to applications therefor by States and municipalities.

16 U.S.C. 800(a) (emphasis supplied)

The relicensing preference is contained in the eleven underlined words, which expressly confine its scope to "new licensees under section 15 hereof." Section 15(a) unambiguously identifies these "new licensees" as licensees other than an "original licensee":

> If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, *the commission is authorized to issue a new license to the original licensee* upon such terms and conditions as may be authorized or required under the then exist-

> ing laws and regulations, *or to issue a new license* under said terms and conditions *to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued *on the condition that the new licensee shall*, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 14 hereof: Provided, That in the event the United States does not exercise the right to take over or *does not issue a license to a new licensee, or issue a new license to the original licensee* upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

16 U.S.C. 808(a) (emphasis supplied).

The language needs no elaboration, so carefully did Congress use "new licensee" and "original licensee" as opposite terms. The distinction between these terms is necessary to the sense of the section and is explicitly drawn in the three places italicized in the text above. First, the Commission is given a choice upon relicensing either "to issue a new license to the original licensee" or "to issue a new license . . . to a new licensee." Second, the section directs any "new licensee" to make required payments to the prior, original licensee. Third, the proviso specifies that the Commission is to issue an annual license if the United States does not take a project over (under section 14), and does not exercise either of its choices under section 15, either to "issue a license to a new licensee" or to "issue a new license to the original licensee."

Congress acted purposely in distinguishing between "new" and "original" licensees in section 15. In each noted circumstance, section 15 would be nonsensical if the term "new licensee" were interpreted to encompass

an "original licensee." Section 7(c) and section 22 of the Act, 16 U.S.C. 800(c), 815, also employ the terms "new" and "original licensee" as terms of art describing mutually exclusive categories.[16] The scope of the relicensing preference in section 7(a) is, accordingly, simple to discern: since "new licensees under section 15" do not include "original licensees," the preference against these "new licensees" does not apply against "original licensees," but only against other applicants.

2. *The Legislative History Confirms that Congress Intended the Statute to Carry Its Plain Meaning*

The scope of the relicensing preference has a critical present importance. However, it was only a minor part of the great Congressional debates that raged in the years up to 1920 about whether to adopt comprehensive general legislation to encourage non-federal development of the nation's hydroelectric resources and, if so, on what terms. Congress did not add the limited relicensing preference until relatively late in the day, and it provoked no significant controversy in the period between its introduction and the Act's final passage.

The Senate Commerce Committee added the relicensing preference to section 7 of the pending bill in September of 1919. The House version of section 7 as it came to the Senate confined the municipal preference to the preliminary permit and initial license stages by the same language which section 7 now provides. 58 Cong. Rec. 2037-40, 2262 (1919). The Commerce Committee then added the relicensing preference provision.

In its report, the Senate Committee described most of its amendments as being "of a minor character and largely make more clear and certain the meaning of the

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[16] Congress added § 7(c) 82 Stat. 618, confirming the distinction between "new" and "original" licensees, as part of the 1968 relicensing amendments. It is with respect to these amendments that the Commission then informed Congress that the relicensing preference did not apply against "original licensees."

House provisions." [17] In fact, the Committee's relicensing preference amendment was a modest change consistent with the House provisions. The House bill had protected the stake in a project of any private applicant obtaining a preliminary permit, by limiting the municipal preference at the initial license stage to cases in which a preliminary permit had *not* been issued. The House thereby restricted the preference for preliminary permits and initial licenses to apply only against those with no investment in the project. All the Senate Committee's amendment did was to accomplish the "minor" purpose of extending the preference against private strangers to the project to apply at the relicensing stage, leaving original licensees unaffected.

The relicensing preference provision itself was the subject of virtually no discussion when the bill came to the Senate floor. However, the Commerce Committee's proposal to amend section 15 to require the Commission to issue annual licenses if "reasonable" new terms were not "accepted" by either "the original or a new licensee" [18] triggered an extensive debate. That debate focused on the use of, and relationship between, the terms "new licensee" and "original licensee" and demonstrated the Senators' keen awareness of section 15's distinction between the two terms.

The debating Senators quoted the new language in section 15's proviso that distinguished between "new licensees" and "original licensees" 23 times.[19] They used the term "new licensee" in direct speech to describe the class of strangers to the project wholly distinct from the "original licensee" 98 times.[20] They used "original li-

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[17] 1919 Senate Commerce Committee Report at 1.

[18] 1919 Senate Commerce Committee Report at 16.

[19] 59 Cong. Rec. 1042-43, 1045-46, 1048, 1108, 1433, 1435, 1472.

[20] *Id.* at 245-46, 1043-48, 1108, 1435-37, 1441-43, 1473, 1483. The Senators also employed such synonyms as "new applicant," "some

censee" separately and distinctly from "new licensee" 67 times; and, they quoted language in the bill using "original licensee" in this distinctive way an additional 21 times.[21] In spite of the ample opportunity afforded by this lengthy debate, not once did any Senator ever employ the term "new licensee" to include or refer to the "original licensee" in any way.

The Senators thus used "new" and "original" licensees spontaneously as distinct terms under section 15 with undeviating accuracy at the same time they were adding the phrase "new licensees under section 15" to section 7. In so doing, they demonstrated clearly that Congress intended the relicensing preference not to apply against "original licensees." Yet, neither the Commission nor the court of appeals made any mention of this direct, contemporaneous evidence of what Congress understood the statutory words to say.

C. The Court of Appeals Erred in Approving the Commission's Use of Legislative History To Evade the Statutory Language

1. *The Court Used Legislative History to Substitute For Analysis of the Language of the Act*

The court of appeals not only failed to consider this critical legislative history of what Congress meant by the statutory words. The court failed also to examine the language of the Act. It found section 7(a) "sufficiently ambiguous to merit resort to legislative history" simply because both sides had presented different interpretations each of which it asserted, without explanation, was "rea-

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new person," "outsider," "somebody else" and "third person" which distinguish such parties from the "original licensee." *Id.* at 1046, 1172, 1045, 1472.

[21] *Id.* at 245-46, 1042-48, 1108, 1435-37, 1441-43, 1472-73, 1483. The Senators also described the original licensee at relicensing as simply "the licensee," the "old licensee," the "original corporation" and a number of other related terms, but never as a "new licensee." *Id.* at 1042-49, 1100-01, 1172-73, 1436, 1441-43, 1473-75, 1045, 1437.

sonable." Having done so, the court adopted the Commission's conclusions about legislative history to overcome "the plain meaning [of the Act] advanced by petitioners." (Pet. App. 9a, 10a).

In so doing, the court stood on its head the relationship between statutory language and historical evidence of what Congress intended that language to mean. As this Court has said:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980). *See also Central Trust Co., Rochester, N.Y. v. Official Creditors' Committee of Gerger Enterprises, Inc.*, 102 S. Ct. 695 (1982); *Caminetti v. United States*, 242 U.S. 470, 490 (1917).

2. The Court of Appeals Mistakenly Relied on Vague and General Historical Materials that Cast No Light Upon What Congress Actually Intended the Relicensing Preference of Section 7(a) to Mean

The court of appeals also erred in relying upon aspects of the historical material that it conceded were "weak" and which it wrongly claimed were all that could be found. (Pet. App. 13a). Neither the Commission, nor the court of appeals which followed the Commission's lead, grounded its analysis in the history of the specific statutory provision, a history which demonstrates that Congress meant to confine the preference to apply only against applicants other than original licensees. (See pages 13-15, *supra*). Instead, the Commission and the court based their construction on impressions drawn largely from unfocused statements made by non-Congressmen, most of them uttered well before the relicensing preference amendment was even proposed. Neither the Commission nor the court cited any statement in the legisla-

tion's long history which said in straightforward terms that any bill contained a relicensing preference applicable against the project's original licensee.

The foundation of the Commission's interpretation is its assumption that the legislation contained a "silent" municipal preference against original licensees upon relicensing from the time an "Administration bill" was introduced in early 1918.[22] That bill made no reference to any municipal preference in relicensing proceedings. Nonetheless, Opinion 88 claimed that it "silently" contained a relicensing preference against the original licensee. And, the Opinion claimed that this "silent" relicensing preference remained in each version of the bill that preceded the action of the Senate Commerce Committee in adopting the specific relicensing preference amendment a year and a half later. (Pet. App. 66a).

The Commission's principal evidence for the claim of a "silent" preference was language in an internal memorandum written by Mr. O. C. Merrill, an official in the Forest Service, nearly two years before the Senate Committee added the relicensing preference amendment to section 7(a).[23] The memorandum would have been useless as an indication of what Congress intended even if it had flatly stated that some draft contained a relicensing preference against original licensees. It was never conveyed to Congress, appears nowhere in the legislative record, was written before the Administration bill was introduced and apparently refers to a draft that was never submitted. In fact, the memorandum made no claim that the hypothetical bill it described contained a relicensing preference, silent or expressed, in favor of municipal applicants. Instead, it stated that "the original licensee" would "secure renewal of the license" if the

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[22] The discussion follows the Commission's analysis in Opinion 88 since the court of appeals relied heavily on the Commission's approach, but only described that approach in summary terms. Pet. App. 10a-13a.

[23] Pet. App. 32a-34a.

United States or a State or municipality did not "acquire" the properties and operate them for public purposes. If the reference to acquisition by governmental bodies describes anything that was contained in the final bill enacted three years later, it would appear to apply to the take-over provisions of what was eventually enaction as section 14.[24]

As the Commission examined the effect of each of the several amendments to section 7 which Congress adopted in the year and a half between the Administration bill and the Senate Commerce Committee amendment, it concluded that each new version merely demonstrated, in words it repeatedly underlined, "*no expressed intent to eliminate*" this "silent" municipal preference. (Pet. App. 37a, 38a, 40a, emphasis in the original). It so concluded, even though:

> (1) the language of the amendments, taken together, confirmed the confinement of the preference then in the bill to the preliminary permit and initial license stages;
>
> (2) the Chairman of the House committee considering the bill specified that it contained *no* relicensing preference (an expression the Commission rejected by saying that the Chairman may not have understood the bill); (Pet. App. 36a, n.21); and,
>
> (3) the Commission's position led it to accuse a Conference Committee of having "obscured" the bill when it made the confinement of the preference to initial licensing more explicit. (Pet. App. 39a).

When the Commission finally turned to the amendment of the Senate Commerce Committee, it conceded that the bill which came to that Committee "made it

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[24] Although Mr. Merrill testified extensively, describing the proposed water power legislation in detail, Hearings on S. 1919 before the House Water Power Comm., 65th Cong., 2d Sess. at 4-154 (1918) (1918 House Hearings), nowhere in that testimony did he refer to a relicensing preference in favor of municipal applicants. Mr. Merrill was not involved in the action of the Senate Commerce Committee in adding the relicensing preference amendment in 1919.

appear that the municipal preference applied only to the issuance of preliminary permits and some initial licenses."[25] (Pet. App. 39a, emphasis in the original). Nonetheless, the Commission stuck to its guns. It found that the amendment to extend the preference to apply against "new licensees" on relicensing had to be interpreted to apply against "original licensees" since the preceding bills had silently incorporated a relicensing preference that reached original licensees. (Pet. App. 43a).

The Commission thus insisted that only an express Congressional repudiation could negate a silent preference against original licensees.[26] Justice Frankfurter cautioned long ago that, "The search for significance in the silence of Congress is too often the pursuit of a mirage." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942). As this Court said in *Harrison v. PPG Industries*, 446 U.S. 578, 592 (1980):

> it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

The court and the Commission gave no meaningful weight to what members of the House and Senate and their committees said and did about any preference upon

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[25] That version of § 7(a), whose language plainly confined it to preliminary permits and certain initial licenses, had in large part been suggested by Mr. Merrill during his testimony before the special House Committee on Water Power long after his 1917 memorandum. 1918 House Hearings at 112.

[26] The Commission thereby put the litigants to the daunting experience of scouring the historical record for the complex documentation necessary to prove that something never in the bill was really not "silently" present. PGandE's Brief to the court below, pages 50-80, provides a detailed analysis of the evidence demonstrating that a relicensing preference was *not*, silently or otherwise, in the bill until it was added by the Senate Committee.

relicensing, and gave no weight at all to the way Congress and its members actually used and understood the words it enacted in section 7. Instead, each relied largely on ambiguous material from non-legislators outside the legislative record.[27] These materials included Mr. Merrill's 1917 internal memorandum, other Merrill writings outside of the Congressional record and a letter from Gifford Pinchot to Senator Jones.[28] In fact, none of these materials state that there is a relicensing preference against original licensees (see, *e.g.*, the discussion of the Merrill memorandum at pages 17-18, *supra*); and, indeed, the text of Mr. Pinchot's letter demonstrates that he himself understood the term "new licensees under section 15" *not* to include "original licensees."[29]

The views of non-Congressmen, even on the record, are a highly dubious basis for determining what Congress intended when it enacted the language in dispute. See *S&E Contractors*, 406 U.S. at 13, n.9. Indeed, even the views of an important Congressman may not be "a reliable indication as to congressional intention" although the Congressman was a sponsor of the bill. *GTE Sylvania*, 447 U.S. at 118-19.[30] Surely then, the reliance of

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[27] Virtually the only recorded history which the court cited was an excerpted statement from ambiguous and often confused testimony of a private witness at 1918 House hearings, more than a year before the relicensing preference was added. (Pet. App. 11a.) As this Court said in *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 at n.9 (1972), courts must be "extremely wary of testimony before Committee hearings."

[28] Pet. App. 10a-12a.

[29] See PGandE brief to the court below, pages 33-35.

[30] Opinion 88 cited a brief statement of one Congressman, made after adoption of the Commerce Committee amendment, which referred to a preference in "acquiring the properties of another licensee" (Pet. App. 45a). The statement, for what it is worth, appears to refer to a situation in which the "original licensee" is not involved in the contest, since the "original licensee" would not be acquiring its own properties; as such, it is consistent with the amendment since the preference only applies "in issuing licenses to new licensees under section 15."

the court and the Commission in this case on the isolated, unpublished historical fragments they employed is "an exercise fraught with hazards." *New England Power Co. v. New Hampshire*, 102 S. Ct. 1096, 1102 (1982).[31]

By the time the Senate Commerce Committee added the relicensing preference to the bill, federal water power legislation had long been the subject of sharp conflicts on a wide range of issues. By then, the years of controversy had made clear that only a bill which compromised the many conflicts could pass, and the final bill was such a compromise. Compromises are cemented in words, and the terms of a bill that is finally enacted are quite likely to contradict much that has previously been said. By ignoring the words of the Act and the history of the adoption of those words and by basing their conclusion on vague statements largely antedating the addition of the relicensing preference to the bill, the court and the Commission failed to heed Justice Harlan's admonition, in *United States v. Sisson*, 399 U.S. 267, 298 (1970):

> Care must be taken, however, to respect the limits up to which Congress was prepared to enact a particular policy, especially when the boundaries of a statute are drawn as a compromise resulting from the countervailing pressures of other parties.

The Commission conceded in its Rehearing Order that the legislative history on which it rested Opinion 88 was "lengthy and occasionally opaque" and not "clearly dispositive of the question before the Commission." (Pet. App. 83a). Although the court of appeals held that the Commission "properly relied heavily upon legislative his-

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[31] Petitioners first learned of the existence of the Merrill and Pinchot writings when the Commission retrieved them from files and used them in the case, and petitioners obtained copies only pursuant to a "freedom of information" request. The reliance on such random "inaccessible law" goes well beyond any conventional use of *legislative* history, and thereby places the law deeply in that "fog in which little can be seen if found" which Justice Jackson described in his concurring opinion in *United States v. Public Utilities Commission of California*, 345 U.S. 295, 320 (1953).

tory," it admitted that the historical material on which it and the Commission relied to alter the plain meaning of the statutory language is "weak." (Pet. App. 10a).[32] As this Court has made clear, such ambiguous legislative history cannot be used to rewrite a statute's terms. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S. Ct. 2142, 2151 (1981); *GTE Sylvania*, 447 U.S. at 108.

Furthermore, the court of appeals committed clear error in holding that the limited historical material it cited is "apparently all that is available." (Pet. App. 13a). To the contrary, the Commission itself had described the history as "lengthy." (Pet. App. 83a). Further, as the parties responded to Opinion 88's historical focus, their briefs to the court had discussed a vast quantity of historical material, much of it pertaining directly to the relicensing preference amendment itself.

D. The Court Erred in Finding "Absurd" a Construction of the Act That Allows Relicensing Contests Between Original Licensees and Municipal Applicants To Be Decided On Their Merits

The court of appeals also approved the Commission's refusal to follow the words of the statute (Pet. App. 67a-71a) "because the plain meaning advanced by petitioners leads to absurd results." (Pet. App. 10a). If that plain meaning is followed, the Commission will decide relicensing contests between original licensees and municipal applicants wholly on the merits, with the license to be awarded to the applicant whose plans will best serve the public interest. The court and the Commission contend that such a result is so "absurd" that Congress could not have intended it. *But see Tennessee Valley Authority v. Hill*, 434 U.S. 954 (1978).

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[32] In fact, as shown, *supra* at pages 13-15, the history demonstrates that Congress intended the relicensing preference to mean what it plainly says.

There is nothing absurd about a preference which applies only against strangers to the project, and not against the original licensee. Congress intended the Act to provide incentives to, and protections for, private investors willing to develop and operate hydro projects; and, original licensees have done so under license and statute for decades.[33] Even where a project has yet to be built, the Act limits the preference to protect investment. Under section 7(a), if a preliminary permit has been issued to a developer other than a municipality or state, the preference does not apply at the time of initial license.[34]

By the time of relicense the private holder of the original license and its customers will have developed a much deeper, more substantial stake in the project than that of any preliminary permittee. It would thus be illogical and inconsistent with the statute's pattern of according municipal preference only among those with no established stake in the project to apply the relicensing preference against the original licensee.

The court erroneously accepted, without discussion, the Commission's contention that the relicensing preference would only apply to "worthless projects" unless it operates against the original licensee. (Pet. App. 10a).[35]

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[33] As this Court has found, "the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251 (1954). "The Act was dedicated to 'encouraging private enterprise and the investment of private capital' in power projects on a basis consistent with the public interest." *Id.* at n.15 (quoting H. Rep. No. 61, 66th Cong., 1st Sess. 3).

[34] In the case of a tie between the plans of the preliminary permittee and those of any other applicant (including municipalities) for an initial license, the Commission's rules direct the award of the license to the preliminary permittee. 18 C.F.R. § 4.33(h) (1982).

[35] Any inference that the plain meaning of § 7(a) would deprive municipal applicants of opportunities upon relicensing is erroneous. A municipal applicant can obtain a license for a valuable project

The preference will apply to projects of "worth" whenever the relicensing applicants include a municipal system and at least one private newcomer to the project. In fact, there are several situations where (as Congress would have anticipated) the final choice would not involve the "original licensee" but would be between "new licensees." [36]

The court also found the plain meaning of the Act "absurd" because it provides no relicensing preference to a "municipal original" licensee, a result the court then stated "would cause administration of the Act by the Commission to be confusing and sporadic." (Pet. App. 10a). No challenge to any original municipal licensee has yet arisen. Should such a contest occur, a municipal licensee, which has assumed the risks and responsibilities of development and also possesses the public interest advantages of incumbency, would prevail if its continued operation is "best adapted" to meet the goals specified by the statute. Section 10(a), 16 U.S.C. 803(a). The prospect that without a preference the Commission would have no basis to decide between a hypothetical municipal original licensee and a competing private applicant is speculative, hardly an "absurdity" justifying departure from the statute's language.

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on relicensing, regardless of preference, any time it establishes the superiority of its plans under the public interest to those of the original licensee.

[36] For example, the Commission might find that the original licensee's performance during the initial term or its plans for the relicense term make it less well suited to serve the statute's purposes than new applicants. Also, Congress contemplated that licensed projects would be operated not only by electric utilities, large and small; but also by diverse manufacturing concerns, any of whom might retire from business, find investment in needed improvements and additions to capacity too burdensome or relocate their manufacturing facilities away from the projects. Finally, the original licensee may be unwilling to accept relicense on more onerous new terms and conditions proposed by the Commission upon relicense—a possibility that Congress specifically considered. *Cf.* the debate over the annual license proviso, described *supra* at pages 14-15.

Congress did not intend to resolve every question concerning every conceivable relicensing situation when it passed the Act in 1920. It knew that it could not anticipate the circumstances of half a century or more later and therefore avoided "tying the hands" of those who would then decide relicensing issues on grounds relevant to then existing conditions.[37]

It was precisely this open nature of the Act's relicensing provisions that led the Commission to ask Congress to amend certain aspects of the Act's relicensing provisions in 1967-68. When Congress then examined the Act's relicensing provisions after the Commission had explained that the relicensing preference did not reach the original licensee, it found no "absurdity" in that result. Rather, it left the preference intact while amending other of the Act's relicensing provisions.

E. The Court of Appeals Mistakenly Gave "Great Deference" to the Commission's Interpretation of the Statute

The decision of the court of appeals turned on its holding that "We must give *great deference* to the Commission's statutory interpretation." (Pet. App. 13a, emphasis supplied). While a court is not to reverse an agency's construction of a statute if it is " 'sufficiently reasonable' to be accepted," *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1982), the court must carefully analyze the critical statutory terms for itself, to determine if the agency's construction is indeed reasonable. *Id.* at 32. In fact, the question of statutory construction presented in this case is "a narrow legal issue that is readily susceptible of judicial resolution." *GTE Sylvania*, 447 U.S. at 120.

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[37] Interior Secretary Lane, 1918 House Hearings at 466. As Senator Norris said, "At the end of the 50-year period . . . Congress will undoubtedly legislate upon the subject. We can not now tell, even by the wildest stretch of the imagination, what conditions are then going to be." 59 Cong. Rec. 1438 (1920).

This case provided no basis for deference. The Commission offers no long-standing construction consistently adhered to. Instead, its present interpretation was announced sixty years after the statute was enacted, does not purport to be based on the language of the statute, is premised not on administrative expertise but on "weak" legislative history and contradicts the Commission's own interpretation of the language formally presented to Congress. *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 (1979); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

A court cannot know whether, and to what extent, an agency is entitled to deference until it has given the agency's construction careful scrutiny. As Justice Jackson said in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944):

> The weight of [agency] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In this case there is every indication that the court of appeals did not defer to the Commission because the court had examined its rationale carefully and found it deserving of respect. Rather, it seems to have employed "great deference" as a ground for abstaining from exercising its own independent judgment. The confused nature of Opinion 88's treatment of the Act, which avoids the manifest statutory linkage between sections 7 and 15 and is based on a "silent" preference, should have led the court of appeals to its own searching analysis. However, the court never analyzed the terms of the statute, but rather relied on historical material submitted by the Commission, material even the court admitted to be "weak." (Pet. App. 10a). Petitioners sub-

mit that "deference" thus served as a substitute for the scrutiny of agency action which the gravity of the case demands and which judicial review requires.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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